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Robert R. Corbin

February 27, 1989

Mr. Charles L. Miller, Director
Arizona Department of Transportation
206 South Seventeenth Avenue
Phoenix, Arizona 85007

Re: I89-022 (R87-017)

Dear Mr. Miller:

You have raised a series of questions regarding the operation of the state's public records law, A.R.S. §§ 39-121 to -122, on accident reports filed with the Arizona Department of Transportation (ADOT) pursuant to A.R.S. § 28-667. The latter statute requires all law enforcement officers and public employees who investigate serious motor vehicle accidents to prepare a written report of those accidents. It directs that the original report be retained by the investigating agency and a copy of the report be forwarded to ADOT for its own use.^{1/}

You first ask whether ADOT or the originating agency is the "official custodian" of the accident report for purposes of public records requests. We conclude that both are custodians.

1/ The statute reads in full:

Every law enforcement officer or public employee who, in the regular course of duty, investigates a motor vehicle accident resulting in bodily injury or death or damage to the property of any person in excess of five hundred dollars, either at the time of and at the scene

Charles L. Miller
February 27, 1989
Page 2

All officers and public bodies are required to maintain records of their official activities. A.R.S. § 39-121.01(B). A.R.S. § 39-121 provides that these public records shall be open to inspection by any person at all times during office hours.^{2/} Accident reports are public records under A.R.S. § 39-121. Ariz. Att'y Gen. Op. 181-088. A.R.S. § 39-121.01(A)(2) defines "public body" as

the state, any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency supported in whole or in part by funds from the state or any political subdivision thereof, or expending funds provided by the state or any political subdivision thereof.

ADOT and the agencies originating accident reports are public bodies covered under the public records statutes. Each has an independent duty to respond to public records requests

of the accident or thereafter by interviewing participants or witnesses shall, within twenty-four hours after completing such investigation, complete a written report of the accident. The original of the report shall be retained by the agency employing such officer or public employee. A copy of such report shall be forthwith forwarded to the department for its use. The department may place such notes, date stamps, identifying numbers, marks or other information on such copies as its needs require, provided that such shall not alter the original information reported by the investigating officer or public employee.

^{2/} Despite the unlimited disclosure expressed by the wording of section 39-121, the availability of records for public inspection is not without qualification, both by statutory exemption and common-law limitation. Carlson v. Pima County, 141 Ariz. 487, 490, 687 P.2d 1244, 1247 (1984).

Charles L. Miller
February 27, 1989
Page 3

for documents within its own custody or control. In addition, A.R.S. § 28-667 expressly allows ADOT to add information to accident reports, creating the possibility of discrete records with diverse contents. Finally, nothing in the public records statutes suggests there may be only one custodian of each document.

Your second question indicates that ADOT microfilms all accident reports without regard to whether such reports contain arrest information. You inquire whether the presence of such information affects the public's right to inspect the microfilmed records. Although your question does not specify the precise nature of the arrest information, we assume it would consist of notations of citations issued and arrests made in connection with the accident under investigation. Information of this type would not ordinarily raise confidentiality concerns, since arrest records are public records available for public inspection. See Beasley v. Glenn, 110 Ariz. 438, 439-40, 520 P.2d 310, 311-12 (1974) (the public's interest in preserving arrest records outweighs the individual's privacy concerns).

However, the public has no right to inspect arrest records if the source of the arrest information is the criminal history record data maintained by the criminal identification section of the Department of Public Safety (DPS). We have previously advised DPS not to include arrest information in accident reports because A.R.S. § 41-1750 precludes the inclusion of data from this source in public records. Ariz. Att'y Gen. Op. 181-088.^{3/}

More recently we addressed the issue of secondary dissemination of criminal history record information by regulatory agencies that are eligible to receive the

^{3/} An addendum to the opinion emphasized that the opinion was directed to DPS and did not extend to law enforcement agencies not subject to the restrictions of A.R.S. § 41-1750. Addendum to Ariz. Att'y Gen. Op. 181-088 (November 19, 1981).

confidential information from DPS.^{4/} We concluded that the information remains "exempt by law from public inspection," and that A.R.S. § 41-1750(D) makes it a misdemeanor to release this criminal history record information to the public or to use it for unauthorized purposes. Ariz. Att'y Gen. Op. 187-131. Nonetheless, the special safeguards that apply to this source do not render all other arrest records confidential in contradiction to Beasley v. Glenn.

Given the limited purpose of the accident reports required by A.R.S. § 28-667, and our prior advice to DPS that confidential criminal history record information not be included in such reports, it is unlikely that the reports would incorporate confidential criminal history data. If you have reason to believe that confidential information has been included, the appropriate course is to redact it from the copy of the report made available for public inspection, rather than to deny complete access to the record. See Carlson v. Pima County, 141 Ariz. 487, 490-91, 687 P.2d 1244, 1247-48 (1984).

In your third question you recognize that there are circumstances when a public agency may deny access to public records on the ground that inspection would be contrary to "the best interest of the state." See Carlson at 491, 687 P.2d at 1248. You indicate that accident reports have been requested for use in litigation against the state and inquire how ADOT should make a best-interest determination in this context. We conclude that this exception does not support the withholding of accident reports solely because those reports are potentially adverse to the state's litigation interests.

Although the Carlson decision does not define "best interest of the state," nothing in it or in other decisions suggests that officials may deny access to public records simply because the records might be used to establish tort liability on the part of the state. Rather, in Church of Scientology v. City of Phoenix, 122 Ariz. 338, 339, 594 P.2d 1034, 1035 (App. 1979), the court stated that the appropriate test was whether the "release of the information would have an important and harmful effect upon the official duties of the official or agency" (quoting Ariz. Att'y Gen. Op. 76-43). Applying this test in Dunwell v. University of Arizona, 134 Ariz. 504, 508, 657 P.2d

^{4/} ADOT is such an agency. See Exec. Order No. 86-12, 1 Ariz. Leg. Serv. A-86 (1987).

917, 921 (App. 1982), the court affirmed an award of attorney's fees for wrongfully denying access to records. The defendants had denied access to records of an internal investigation of allegations of an improper athletic slush fund which, if released, would have put them in a bad light and subjected them to the possibility of sanctions by the NCAA and the Pac-10 Conference. See id. at 505, 657 P.2d at 918. The court reasoned that "damage control" in the hope that the true facts would never have to be divulged was not a compelling state interest. Id. at 508, 657 P.2d at 921. The best interest of the state is limited to protecting its legitimate activities; public access is the general rule. See Carlson at 491, 687 P.2d at 1248.

You next ask what information ADOT should obtain from requesting parties in order to determine whether inspection of computer-generated accident report summaries^{5/} prepared by ADOT is in the best interest of the state. We conclude that the particular circumstances of each request control both the nature of the information required by ADOT and the determination of whether to permit inspection or copying of summaries.

Case law gives public officials limited discretion to deny access to public records on grounds of "confidentiality, privacy or the best interest of the state," see Carlson at 491, 687 P.2d at 1248, irrespective of whether the request to inspect is for a commercial or non-commercial purpose. Ordinarily the decision to withhold on this basis can be made from the nature of the records themselves, and would not be dependent upon information possessed by the requesting party. The determination whether to deny access must be made on a case-by-case basis. See Mitchell v. Superior Court, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984).

Arizona's public records statutes draw a distinction between requests for copies of records to be used for commercial and non-commercial purposes. See A.R.S. § 39-121.03. Only when copies of records are sought for a commercial purpose does the statute require the requesting party to formally supply

^{5/} You indicate that personal identifying information is not included in these summaries.

information to the custodian.^{6/} A.R.S. § 39-121.03 compels the commercial requestor to provide: "a certified statement setting forth the commercial purpose for which the copies, printouts or photographs will be used." This information is to enable the custodian to determine whether the request constitutes "a misuse of public records" or "an abuse of the right to receive public records."^{7/} No similar statute requires the requestor to supply specific information to ADOT if the requesting party is seeking copies of accident summaries for a non-commercial purpose.

If ADOT is confronted with a commercial request for copies of accident summaries, it should obtain all information reasonably necessary to making the determination required by A.R.S. § 39-121.03(B). Since commercial purposes will vary, the determination of whether the use for the contemplated commercial purpose constitutes a misuse or is an abuse of the right to receive public records must be made on a case-by-case basis.

Finally you ask whether ADOT should release accident reports or computer-generated accident summaries that relate to city streets or county roads without first obtaining the approval of the jurisdiction involved. ADOT is an official custodian of the accident reports and is independently subject to the requirements of A.R.S. §§ 39-121 to -122. Nothing in the language of the public records statutes or relevant court decisions suggests that a political subdivision or municipality has authority to veto ADOT's duty to comply with the public records law.^{8/}

^{6/} A.R.S. § 39-121.03 applies only to requests for copies, printouts or photographs of public records. It does not apply to a request to inspect.

^{7/} If such a determination is made, the custodian is directed to apply to the Governor for an executive order prohibiting the furnishing of copies for such a commercial purpose. A.R.S. § 39-121.03(B).

^{8/} We do not mean to suggest that dual custodians should not confer regarding the release of confidential documents which both hold. For example, where a law enforcement investigation is ongoing, a unilateral release by one custodian could be contrary to the best interest of the state.

Charles L. Miller
February 27 , 1989
Page 7

In summary, we conclude that both ADOT and the originating agency are custodians of accident records; each is independently responsible to comply with the public records statutes. Additionally, we conclude that information noted on the accident report consisting of citations or arrests made in connection with the accident being investigated is public information available for inspection, but that, if the arrest record notations are from confidential DPS criminal history data, they should be redacted before the report is made available. We further conclude that the exception for the best interest of the state does not support withholding of accident reports because they are potentially adverse to the state's litigation interests; and, finally, that determinations of whether to deny access to or copies of public records depend upon a case-by-case evaluation of the particular circumstances of the request.

Very truly yours,



BOB CORBIN
Attorney General

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